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# THE ELIMINATION OF MRE 803A? *PEOPLE v. GURSKY* AND ITS QUALIFICATION OF SPONTANEOUS STATEMENTS

*Cristina Roberti\**

## INTRODUCTION

On multiple occasions in 2005 and 2006, Jason Gursky sexually molested his girlfriend's daughter, who was six and seven years old at the time of the offenses.<sup>1</sup> The police did not discover the sexual abuse until a close family friend of the victim's mother (and the victim) questioned the young girl and asked "if anyone had been touching her."<sup>2</sup> When the young girl responded with detailed and specific answers, volunteering information as to how and when Gursky had sexually molested her, the family friend reported the abuse to the police.<sup>3</sup> Gursky's conviction in July 2010<sup>4</sup> was the justice the young victim deserved. However, the court's limitation on the usage of a hearsay exception<sup>5</sup> created a major setback for child victims of sexual abuse, as the limitation introduced an

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\* J.D. Candidate, Brooklyn Law School, 2012; B.A. Boston College, 2009. I would like to thank my family for all of their love and support. Special thanks to Professor Frederic Bloom and Scott Krischke for their guidance. I would also like to thank the entire *Journal of Law and Policy* staff for all of their advice and assistance.

<sup>1</sup> *People v. Gursky (Gursky II)*, 786 N.W.2d 579, 582–83 (Mich. 2010).

<sup>2</sup> *Id.* at 583.

<sup>3</sup> *Id.* at 583–84.

<sup>4</sup> *Id.* at 582, 597 (affirming defendant's 2008 conviction of four counts of first-degree criminal sexual conduct for sexually abusing his girlfriend's child).

<sup>5</sup> *Id.* at 591.

additional and significant hurdle to the successful prosecution of their abusers.

While upholding defendant Gursky's conviction, the Michigan Supreme Court held that the young victim's statements to her family friend in 2006, when she had first disclosed the sexual abuse, were inadmissible as evidence because the child had not introduced the subject of sexual abuse.<sup>6</sup> The court thus established that whenever a child does not *broach* the subject of sexual abuse, the child's statements to an adult regarding the sexual abuse will not fall within Michigan Rule of Evidence ("MRE") 803A, an exception to the hearsay rule that specifically applies in child sexual abuse cases.<sup>7</sup> The *Gursky* court's restriction of MRE 803A negates the rule's very purpose of facilitating the prosecution of child sexual abuse cases.<sup>8</sup> Moreover, the court acted without justification for or foresight into the consequences of such a limiting interpretation. Had the court adequately balanced the state's interest in the successful prosecution of child sexual abuse cases with the court's interest in ensuring the reliability and trustworthiness of hearsay evidence presented at trial, such a limiting interpretation would not have emerged.<sup>9</sup>

This Note argues that, given the unique nature of child sexual abuse cases, the court should use a totality of the circumstances approach that analyzes all of the child's statements and the circumstances in which they were made, in order to determine admissibility. This approach more adequately serves to further the state's interests without serving as an additional impediment to the prosecution of child sexual abuse cases.

Part I of this Note addresses the various difficulties in prosecuting child sexual abuse cases, including evidence that

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<sup>6</sup> *Id.* at 591-92.

<sup>7</sup> *Id.* (interpreting the contours of MICH. R. EVID. 803A). For Rule 803A in its entirety, see *infra* Part II.

<sup>8</sup> See *infra* Part II.

<sup>9</sup> See Lynne E. Radke, Note, *Michigan's New Hearsay Exception: The "Reinstatement" of the Common Law Tender Years Rule*, 70 U. DET. MERCY L. REV. 377, 405-06 (1993).

children rarely disclose sexual abuse, lack of existing physical evidence and witnesses, and the court's interest in weeding out false accusations. Part II discusses the judicial and legislative responses to the problems faced by the prosecution, including the adoption of MRE 803A and its application by the Michigan courts. Part III of this Note discusses the *Gursky* case, including the facts and the analysis of the statements at issue by both the Michigan Court of Appeals and the Michigan Supreme Court. Part IV argues that the ultimate holding in *Gursky* essentially eliminated MRE 803A and that the decision will make it more difficult to prosecute child sexual abuse cases in Michigan. Part V explains how a totality of the circumstances approach, used by the Michigan Court of Appeals in the *Gursky* case and various other states, is a more appropriate test that weighs the state's interests without hindering prosecutorial efforts.

#### I. DIFFICULTIES ENCOUNTERED IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES

The victim in *Gursky* is among many children in the United States who fall victim to sexual abuse. Child sexual abuse is a growing epidemic in the United States and given its prevalence, the Supreme Court has recognized the need to protect the nation's children from sexual abuse as a compelling interest.<sup>10</sup> Unfortunately, prosecutors face many obstacles in their attempts to prosecute dangerous sexual predators.<sup>11</sup> The underreporting of cases, the fact that most children do not disclose sexual abuse on their own accord, the lack of physical evidence or witnesses in these cases, and the court's need to identify false accusations, all serve as impediments for the prosecution and hinder their efforts to protect child victims from their abusers.<sup>12</sup>

Although it is clear that incidents of child sexual abuse are

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<sup>10</sup> See Lynn McLain, *Children Are Losing Maryland's "Tender Years" War*, 27 U. BALT. L. REV. 21, 25-26 (1997) (citing *Osborne v. Ohio*, 495 U.S. 103, 109 (1990)).

<sup>11</sup> See *infra* Part I for a discussion of the problems faced by prosecutors.

<sup>12</sup> See *infra* Part I.

widespread, the statistics are inconsistent and often inaccurate.<sup>13</sup> One study found that such abuse has been reported up to 80,000 times a year.<sup>14</sup> Another report indicates that in 1993 alone, there were over 200,000 incidents of child sexual abuse.<sup>15</sup> Some researchers estimate that in the United States, one out of every six boys, and one out of every four girls, is sexually abused.<sup>16</sup> One study estimated that in 2008, 772,000 children were victims of abuse or neglect and around nine percent of those were victims of sexual abuse.<sup>17</sup>

While these numbers are alarming, the reason for the disparities among them is even more alarming. Due to the underreporting of child sexual abuse, these statistics fail to accurately reflect the actual number of instances of child sexual abuse.<sup>18</sup> Underreporting is mostly a result of the fact that most

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<sup>13</sup> Tara Ney, *Assessing Allegations in Child Sexual Abuse: An Overview*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT 3, 6 (Tara Ney ed., 1995).

<sup>14</sup> AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY, FACTS FOR FAMILIES: CHILD SEXUAL ABUSE (2008) [hereinafter FACTS FOR FAMILIES], available at [http://www.aacap.org/galleries/FactsForFamilies/09\\_child\\_sexual\\_abuse.pdf](http://www.aacap.org/galleries/FactsForFamilies/09_child_sexual_abuse.pdf).

<sup>15</sup> KIMBERLY A. MCCABE, CHILD ABUSE AND THE CRIMINAL JUSTICE SYSTEM 33 (David A. Schultz & Christina DeJong eds., 2003) (citing ANDREA J. SEDLAK & DIANE D. BROADHURST, U.S. DEP'T OF HEALTH & HUMAN SERVS., EXECUTIVE SUMMARY OF THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 4 (1996), available at <http://www.fact.on.ca/Info/vac/nis3.pdf>).

<sup>16</sup> *Child Sexual Abuse*, NAT'L CTR. FOR PTSD, <http://www.ptsd.va.gov/public/pages/child-sexual-abuse.asp> (last updated Oct. 7, 2011).

<sup>17</sup> U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2008 xiii (2008), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf>.

<sup>18</sup> See FACTS FOR FAMILIES, *supra* note 14; MCCABE, *supra* note 15, at 33; see also SARAH H. RAMSEY & DOUGLAS E. ABRAMS, CHILDREN AND THE LAW 133 (2003); HOLLIDA WAKEFIELD & RALPH UNDERWAGER, ACCUSATIONS OF CHILD SEXUAL ABUSE 255 (1988) ("At present, there is not enough solid data to claim that the frequency of child sexual abuse in the true state of nature is known."). "Because sexual abuse is usually a hidden offense, there are no statistics on how many cases occur each year. Statistics cover only the cases that are disclosed to child protection agencies or to law enforcement." David Finkelhor, *Current Information on the Scope and*

sexually abused children never disclose the abuse.<sup>19</sup> In fact, because of such lack of disclosure, in order to collect more accurate data concerning the prevalence of child sexual abuse, retrospective studies are often conducted where adults are asked about their childhood experiences.<sup>20</sup> One retrospective study indicates that only 33.3% of adults who were sexually abused as a child ever disclosed the abuse to anyone during their childhood.<sup>21</sup> In another retrospective study conducted on a sample of adults who had disclosed the abuse when they were children, over 50% of the adults stated that when they disclosed the abuse in their youth, they were not believed.<sup>22</sup>

There are many reasons why children do not disclose sexual abuse. Often an abused child fears the offender, blames herself<sup>23</sup> for the sexual abuse, or experiences negative emotions like embarrassment, shame, and anger.<sup>24</sup> In many cases, child

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*Nature of Child Sexual Abuse*, FUTURE CHILD., Summer/Fall 1994, at 31, 32; see also Kamala London et al., *Disclosure of Child Sexual Abuse: What Does the Research Tell Us About the Ways that Children Tell?*, 11 PSYCHOL. PUB. POL'Y & L. 194, 194 (2005); McLain, *supra* note 10, at 28.

<sup>19</sup> MARK A. WINTON & BARBARA A. MARA, CHILD ABUSE AND NEGLECT 48 (2001); London et al., *supra* note 18, at 194.

<sup>20</sup> However, either because victims will continue to repress their memories of sexual abuse into their adulthood or remain fearful or hesitant towards disclosure, these retroactive studies still result in an underestimation of the actual rate of child sexual abuse. WAKEFIELD & UNDERWAGER, *supra* note 18, at 258–59. See *supra* Part I for a more in depth discussion about the underreporting of, and inaccuracy in, statistics concerning the prevalence of child sexual abuse.

<sup>21</sup> London et al., *supra* note 18, at 198–201. London analyzed ten retrospective studies and concluded that “only one third of adults who suffered CSA revealed the abuse to anyone during childhood.” *Id.* at 201.

<sup>22</sup> Ney, *supra* note 13, at 6 (citing Ralph Brown et al., *Preliminary Findings of the Long-Term Effects of Childhood Abuse: A Study of Survivors* (1994) (unpublished manuscript)).

<sup>23</sup> Both boys and girls are victims of child sexual abuse. See London et al., *supra* note 18, at 204–06, for a discussion on the differences in the rate of disclosure between boys and girls.

<sup>24</sup> *Child Sexual Abuse*, NAT'L CTR. FOR VICTIMS OF CRIME, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32315> (last visited Nov. 5, 2011); see also RAMSEY & ABRAMS, *supra*

abusers threaten or manipulate their victims, often using aggressive tactics.<sup>25</sup> Often the abusers warn of the potential consequences if the child should divulge the sexual abuse<sup>26</sup> and in many instances, abusers tell their victims to keep the events a secret.<sup>27</sup> Some abusers use physical force, which can result in a child not disclosing the sexual abuse in fear of retaliation.<sup>28</sup> Aside from fear, children are also reluctant to disclose abuse due to feelings of self-doubt and helplessness.<sup>29</sup> Child victims of sexual abuse usually develop low self-esteem and can be mistrusting of adults, making disclosure to someone capable of stopping or reporting the abuse even more unlikely.<sup>30</sup>

Michigan courts have recognized that a child victim may never reveal such abuse outright. In a 1930 case, *People v. Baker*, for example, the court noted that a child's disclosure of sexual abuse may be delayed because of fear or other similar circumstances.<sup>31</sup> In *Baker*, where the victim's father told her not to disclose what had happened, the court acknowledged that "complaining of [her own father's acts] would not occur to her" and the child's "telling of the affair would more naturally arise as the relation of an unusual occurrence and might be delayed until something arose to suggest it."<sup>32</sup> After *Baker*, Michigan courts continually recognized that sexually abused children often

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note 18, at 133; WAKEFIELD & UNDERWAGER, *supra* note 18, at 258 ("The secrecy, shame, and stigma which has surrounded victims and abusers may lead some to hide child sexual abuse."); WINTON & MARA, *supra* note 19, at 48.

<sup>25</sup> *Child Sexual Abuse*, *supra* note 24.

<sup>26</sup> FACTS FOR FAMILIES, *supra* note 14.

<sup>27</sup> See, e.g., *People v. Whipple*, No. 288591, 2010 WL 395747, at \*2 (Mich. Ct. App. Feb. 4, 2010).

<sup>28</sup> *Child Sexual Abuse*, *supra* note 24.

<sup>29</sup> See London et al., *supra* note 18, at 195 (citing Roland Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 CHILD ABUSE & NEGLECT 177-93 (1983)).

<sup>30</sup> See FACTS FOR FAMILIES, *supra* note 14.

<sup>31</sup> *People v. Baker*, 232 N.W. 381, 383 (Mich. 1930).

<sup>32</sup> *Id.* Thus, the court in *Baker* held that a child's statements to her housekeeper were admissible into evidence and the conviction of the victim's father was affirmed. *Id.*

feel threatened and are fearful of disclosing the incidents of sexual abuse.<sup>33</sup> Further, the courts acknowledged that sexual crimes against children are often underreported because of “various lamentable factors, including, but not limited to, the victim being related to the offender, the victim’s age, or the victim’s feelings of fear, embarrassment, or shame.”<sup>34</sup>

Another reason for lack of disclosure is that in most cases of child sexual abuse the victims know their abusers.<sup>35</sup> In these cases the child is often trapped between his or her love or loyalty for the abuser and the realization that the abuse is wrong.<sup>36</sup> In cases where the abuser is the victim’s family member, the child often fears that by disclosing the abuse, he or she will break up the family or incur the shame of other family members.<sup>37</sup> Additionally, in sexual abuse cases where a family member is the abuser, the families are characteristically “secretive in nearly all of their family activities, overly possessive of their children, and operate in an environment where the abused child and his or her abuser are often alone with each other.”<sup>38</sup>

An additional impediment to a child reporting abuse is that, because of the child’s immaturity, “a young child may not know, or may know only on some intuitive level, that what is

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<sup>33</sup> See, e.g., *People v. Hammons*, 534 N.W.2d 183, 185 (Mich. Ct. App. 1995) (holding the child’s delay in relating the events of sexual abuse was excusable “because of the nine-year-old complainant’s fear of reprisal against her father, the defendant”); *People v. Foreman*, 410 N.W.2d 289, 293 (Mich. Ct. App. 1987), *vacated*, 432 N.W.2d 172 (Mich. 1988).

<sup>34</sup> *People v. Cooper*, 559 N.W.2d 90, 92–93 (Mich. Ct. App. 1996) (citing Donald Dripps et al., *Special Issue on Women and the Law Panel Discussion: Men, Women and Rape*, 63 *FORDHAM L. REV.* 125, 134–37 (1994)).

<sup>35</sup> RAMSEY & ABRAMS, *supra* note 18, at 133. Less than one-half of the cases of child sexual abuse are extrafamilial. MCCABE, *supra* note 15, at 38; *Child Sexual Abuse*, *supra* note 24.

<sup>36</sup> *FACTS FOR FAMILIES*, *supra* note 14.

<sup>37</sup> *Id.*

<sup>38</sup> MCCABE, *supra* note 15, at 35 (citing SUZANNE SGROI, *HANDBOOK OF CLINICAL INTERVENTION IN CHILD SEXUAL ABUSE* (1982)).



happening is wrong and uncomfortable.”<sup>39</sup> Further, children who are sexually abused may not be capable of expressing their experiences because of their lack of knowledge or understanding.<sup>40</sup> Even children with a better understanding may be uncomfortable disclosing the details of the abuse because of the discomfort they feel towards sexual topics at such a young age.<sup>41</sup>

In fact, many psychiatrists are suspicious if a child readily discloses abuse because of the difficulties children typically face in reporting abuse, as well as the statistical evidence supporting lack of disclosure.<sup>42</sup> One study suggests that, “only those children who initially deny abuse, then make a sexual abuse allegation, then recant it, and later re-disclose, should be considered reliable cases of sexual abuse.”<sup>43</sup> One expert psychiatrist testified that had she “heard about lengthy disclosures with a specific beginning, middle, and end to the story [she] would have been less impressed since that type of recounting is not likely with sexually abused children.”<sup>44</sup>

A child typically discloses the sexual abuse when another adult, aside from the abuser, creates a safe environment for the child in which he or she feels comfortable enough to talk about the abuse.<sup>45</sup> Children are thus more likely to disclose the sexual abuse “when talking to someone who appears to ‘already know’ and is not judgmental, critical or threatening.”<sup>46</sup> As a result, when children disclose their sexual abuse, they usually do not introduce the subject of sexual abuse of their own accord.<sup>47</sup>

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<sup>39</sup> McLain, *supra* note 10, at 28.

<sup>40</sup> See MCCABE, *supra* note 15, at 34.

<sup>41</sup> See, e.g., *People v. Whipple*, No. 288591, 2010 WL 395747, at \*2 (Mich. Ct. App. Feb. 4, 2010) (citing *People v. Hammons*, 534 N.W.2d 183, 185 (Mich. Ct. App. 1995)).

<sup>42</sup> London et al., *supra* note 18, at 196.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (quoting *Lillie v. Newcastle City Council*, [2002] EWHC (QB) 1600).

<sup>45</sup> See FACTS FOR FAMILIES, *supra* note 14.

<sup>46</sup> *Child Sexual Abuse*, *supra* note 24.

<sup>47</sup> See WINTON & MARA, *supra* note 19, at 48; London et al., *supra* note

Without child victims alerting adults to the abuse, prosecutors must rely on the availability of other evidence or indicators in order to prosecute such crimes. Unfortunately, the lack of physical evidence<sup>48</sup> in child sexual abuse cases presents prosecutors with an additional hurdle that makes such offenses difficult to discover, investigate, and prosecute.<sup>49</sup> In most cases, there are no physical indicators of sexual abuse.<sup>50</sup> In fact, “most perpetrators of child sexual abuse do not leave evidence in terms of sperm, blood, or tears in the child’s genital area because, in most cases of child sexual assault, vaginal or anal penetration does not occur.”<sup>51</sup> Further, a child usually displays “no obvious external signs” of sexual abuse, making discovery very difficult.<sup>52</sup> Physical signs may be detected by a physician<sup>53</sup> but such detection is dependent on the child disclosing the abuse soon after the incident.<sup>54</sup> In addition, there are no standard psychological symptoms a child displays that indicate a child has been sexually abused.<sup>55</sup> Without the availability of physical evidence, a child’s statements generally constitute the central evidence in a child sexual abuse case.<sup>56</sup>

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18, at 195.

<sup>48</sup> See London et al., *supra* note 18, at 194 (explaining that medical and physical evidence is lacking in the vast majority of child sex abuse cases).

<sup>49</sup> *People v. Cooper*, 559 N.W.2d 90, 92 (Mich. Ct. App. 1996) (citing Donald Dripps et al., *supra* note 34).

<sup>50</sup> When a child does not report the abuse immediately, the physical evidence will be gone by the time sexual abuse is discovered, if it is ever discovered. MCCABE, *supra* note 15, at 42–43.

<sup>51</sup> MCCABE, *supra* note 15, at 43.

<sup>52</sup> FACTS FOR FAMILIES, *supra* note 14.

<sup>53</sup> *Id.*

<sup>54</sup> See *supra* Part I.

<sup>55</sup> London et al., *supra* note 18, at 194.

<sup>56</sup> *Id.* (citing J. Bays & D. Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91 (1993); A. Berenson et al., *Appearance of the Hymen in Newborns*, 87 PEDIATRICS 458 (1991)). Typically, there is a lack of evidence in child sexual abuse cases. See generally WINTON & MARA, *supra* note 19, at 51 (“[L]ess than 5 percent of sexual abuse cases involve physical evidence.” (citation omitted)). There are some clues to detecting child abuse that include abnormal behavior like “‘acting out,’ engaging in precocious sexual activity, or withdrawing from a

Aside from the dearth of physical evidence or indicators, there is also a lack of witnesses to the abuse.<sup>57</sup> Both the Michigan courts and the U.S. Supreme Court have recognized that child abuse offenses are more difficult to prosecute because “they are generally committed under a shroud of secrecy, leaving the victim as the only significant witness to the offense.”<sup>58</sup>

The possibility of false accusations poses an additional challenge. False accusations by children arise when a child fabricates stories of abuse, or an adult with an ulterior motive influences the child to make a statement that is untrue.<sup>59</sup> Some studies estimate the rate of “false positives” to be around two to eight percent of all child abuse allegations.<sup>60</sup> Such studies indicate that the frequency of false allegations tends to be higher in custody disputes.<sup>61</sup> Often, parties in custody disputes hope to discredit each other in order to prove that one is better fit to care for the child than the other.<sup>62</sup> In the context of these custody battles, some parents may accuse their spouse of sexually abusing their children.<sup>63</sup> Consequently, if the court believes such

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normal touch, such as a pat on the shoulder by a babysitter or a teacher[.]” but these are vague and often hard to identify. *See* McLain, *supra* note 10, at 28 (citing JOHN E.B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 5.3 (3d ed. 1997)).

<sup>57</sup> London et al., *supra* note 18, at 194.

<sup>58</sup> *People v. Cooper*, 559 N.W.2d 90, 93 (Mich. Ct. App. 1996) (citing *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987)).

<sup>59</sup> Ney, *supra* note 13, at 5; *see also* WINTON & MARA, *supra* note 19, at 55–56.

<sup>60</sup> Ney, *supra* note 13, at 6 (citing Arthur H. Green, *Factors Contributing to False Allegations of Child Sexual Abuse in Custody Disputes*, in ASSESSING CHILD MALTREATMENT REPORTS: THE PROBLEM OF FALSE ALLEGATIONS 177–89 (M. Robin ed., 1991)). False positives are “cases where abuse is not occurring but is claimed to be [occurring].” *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> Marion F. Ehrenberg & Michael F. Elterman, *Evaluating Allegations of Sexual Abuse in the Context of Divorce, Child Custody, and Access Disputes*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT, *supra* note 13, at 209, 211.

<sup>63</sup> *Id.* (citing Elissa P. Benedek & Diane H. Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes*, in EMERGING ISSUES

an accusation, the parent accused of the sexual abuse is likely to lose contact with the child while the other parent is likely to receive full custody.<sup>64</sup> When these allegations are true, a grant of full custody to a non-abusive parent is clearly in the best interest of the child. However, a problem arises when one parent falsely reports an instance of sexual abuse that never occurred, or wrongfully influences the child to fabricate a story of sexual abuse in order to obtain full custody.<sup>65</sup> Psychiatrists have found that young children can be improperly influenced by their parent, another close family friend, or professionals, like investigators or therapists.<sup>66</sup>

False accusations do not just occur in custody cases where one parent accuses another parent. False accusations also arise against adults who take care of children, like teachers, camp counselors, or day care employees.<sup>67</sup> Additionally, an adolescent motivated by anger or a desire for the attention that accompanies an accusation of sexual abuse can, on his or her own accord, fabricate an incidence of sexual abuse.<sup>68</sup>

## II. MRE 803A: THE LEGISLATURE'S RESPONSE TO THE DIFFICULTIES IN THE PROSECUTION OF CHILD SEXUAL ABUSE CASES

Faced with the difficulties of prosecuting sexual crimes against children, states crafted evidentiary exceptions particular to child sexual abuse cases in hopes of facilitating prosecutorial

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IN CHILD PSYCHIATRY AND LAW 145-48 (Diane Schetky & Elissa Benedek eds., 1985).

<sup>64</sup> *Id.*

<sup>65</sup> See WAKEFIELD & UNDERWAGER, *supra* note 18, at 294-98.

<sup>66</sup> For a scientific research study on the suggestibility of children, see Stephen J. Ceci & Richard D. Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications*, 86 CORNELL L. REV. 33 (2000). These same studies indicate that absent "significant prompting," children may hesitate to disclose incidents of sexual abuse. *Id.* at 34.

<sup>67</sup> WAKEFIELD & UNDERWAGER, *supra* note 18, at 299.

<sup>68</sup> *Id.* at 300.

efforts.<sup>69</sup> Similarly, the Michigan judiciary and legislature recognized the need to protect children and implemented procedures and recording systems to aid the prosecution of these crimes.<sup>70</sup> Although it was not until 1990 that the legislature adopted MRE 803A,<sup>71</sup> a specific hearsay exception for child sexual abuse cases, the state acknowledged the concerns for the prosecution and recognized a similar exception as early as the mid-1880s.<sup>72</sup>

Prior to the adoption of the Michigan Rules of Evidence in 1978, the Michigan Supreme Court recognized a common law “tender years” exception to the hearsay rule in 1886.<sup>73</sup> In applying the tender years exception, the court in *People v. Baker* held that “where the victim is of tender years, the testimony of the details of her complaint may be introduced in corroboration of her evidence, if her statement is shown to have been spontaneous and without indication of manufacture.”<sup>74</sup> However, when the MRE was adopted in 1978, the legislature failed to include a tender years exception.<sup>75</sup> Given its absence in the rules, the Michigan Supreme Court abolished the exception altogether in *People v. Kreiner* in 1982.<sup>76</sup>

In the years following the *Kreiner* decision, Michigan courts urged a reconsideration of the MRE because of the inherent difficulty of prosecuting child sexual abuse cases.<sup>77</sup> Ultimately,

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<sup>69</sup> For a discussion on New Jersey’s, Delaware’s, and Mississippi’s rules, see *infra* Part V.

<sup>70</sup> *People v. Cooper*, 559 N.W.2d 90, 93 (Mich. Ct. App. 1996).

<sup>71</sup> See MICH. R. EVID. 803A.

<sup>72</sup> *People v. Gage*, 28 N.W. 835, 836 (Mich. 1886); see also JAMES K. ROBINSON ET AL., MICHIGAN COURT RULES PRACTICE: EVIDENCE § 803A.1 (3d ed. 2009).

<sup>73</sup> *Gage*, 28 N.W. at 836; see also *People v. Baker*, 232 N.W. 381 (Mich. 1930); Radke, *supra* note 9, at 382–83.

<sup>74</sup> *Baker*, 232 N.W. at 383.

<sup>75</sup> Radke, *supra* note 9, at 383.

<sup>76</sup> *People v. Kreiner*, 329 N.W.2d 716, 717 (Mich. 1982).

<sup>77</sup> See, e.g., *People v. Lee*, 442 N.W.2d 662, 665 (Mich. Ct. App. 1989) (Weaver, J., dissenting); *People v. Verburg*, 430 N.W.2d 775, 777 (Mich. Ct. App. 1988) (explaining that following *Kreiner*, courts are under increasing pressure to expand the excited utterance exception to replace the

in 1990, the legislature adopted MRE 803A and reinstated the exception.<sup>78</sup> MRE 803A reads:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- 1) the declarant was under the age of ten when the statement was made;
- 2) the statement is shown to have been spontaneous and without indication of manufacture;
- 3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- 4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to meet the statement.

This rule applies in criminal and delinquency proceedings only.<sup>79</sup>

The purpose of the exception is to allow an adult to corroborate out-of-court statements made by a child in order to provide additional credibility to the child's testimony in court.<sup>80</sup>

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tender years doctrine); *see also* Radke, *supra* note 9, at 387–88 (citing *People v. Straight*, 424 N.W.2d 257 (Mich. 1988)).

<sup>78</sup> See MICH. R. EVID. 803A.

<sup>79</sup> MICH. R. EVID. 803A.

<sup>80</sup> ROBINSON ET AL., *supra* note 72.

The rule thus acknowledges that a young child, unfamiliar with the courtroom or court proceedings, may feel more tense or uncomfortable than he or she would outside the courthouse, and may, as a result, testify less credibly and truthfully than he or she would outside the courthouse environment.<sup>81</sup> As a child may also have difficulty articulating earlier events, the rule permits an adult, better able to remember and articulate the earlier event, to testify and corroborate the child victim's statements.<sup>82</sup>

In adopting MRE 803A, the legislature balanced two competing interests. The first was the need to protect children, particularly sexually abused children. The state recognized that to protect child victims of sexual abuse, the exception was necessary to "remedy the unusual difficulties encountered in prosecuting crimes in which the only witness is a young, fearful, and uncommunicative child."<sup>83</sup> Despite the existence of two similar hearsay exceptions, the "medical treatment exception" recognized in MRE 803(4), and the "excited utterance exception" recognized in MRE 803(2),<sup>84</sup> the legislature opted to create an additional exception with modifications specifically for child sexual abuse cases.<sup>85</sup> Most importantly, MRE 803A dispensed of any contemporaneity requirement in the rule.<sup>86</sup> Unlike MRE 803(2),<sup>87</sup> which requires that a statement admitted under the "excited utterance exception" be made contemporaneously with the event or condition, MRE 803A contains no such requirement.<sup>88</sup> In fact, MRE 803A specifically

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<sup>81</sup> *Id.*

<sup>82</sup> See McLain, *supra* note 10, at 25.

<sup>83</sup> Radke, *supra* note 9, at 405 (quoting Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations*, 98 HARV. L. REV. 806, 817 (1985) (internal quotation marks omitted)).

<sup>84</sup> MICH. R. EVID. 803(2), (4). For an explanation of these two exceptions, see Radke, *supra* note 9, at 388-93.

<sup>85</sup> ROBINSON ET AL., *supra* note 72.

<sup>86</sup> See MICH. R. EVID. 803A; Radke, *supra* note 9, at 406.

<sup>87</sup> The excited utterance exception to the hearsay rule permits into evidence "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MICH. R. EVID. 803(2).

<sup>88</sup> *Id.* at 803A.

excuses any delay between the sexual act and the statement, acknowledging that such delay may be “caused by fear or other equally effective circumstance.”<sup>89</sup> Further, MRE 803A is broader than MRE 803(4) in that the statement need not be made for the purpose of medical treatment.<sup>90</sup> In addition, unlike the other two exceptions, the MRE 803A exception applies solely to child sexual abuse cases.<sup>91</sup>

In codifying MRE 803A, the legislature was also concerned with the rights of the accused. Accordingly, the text of the hearsay exception provides several safeguards for defendants in child sexual abuse cases. MRE 803A guarantees “the defendant his constitutional right to confront witnesses testifying against him” by only admitting hearsay to corroborate a child’s in-court testimony.<sup>92</sup> Additionally, the exception requires that the statement be both “spontaneous” and “without indication of manufacture” in order to protect the accused from false allegations.<sup>93</sup> The defendant is further protected because the prosecution must give the defendant notice of its intent to use MRE 803A well in advance of trial so that the defendant has ample time to respond.<sup>94</sup> The text of MRE 803A clearly indicates the intent of the legislature to protect both parties in its creation of an exception tailored specifically to child sexual abuse cases.<sup>95</sup>

### III. *PEOPLE V. GURSKY*: THE COURT’S INTERPRETATION OF WHAT CONSTITUTES A “SPONTANEOUS STATEMENT”

On appeal in the *Gursky* case in 2010, the Michigan Supreme Court only needed to decide whether the child victim’s statements made to an adult in 2006 satisfied the spontaneity

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<sup>89</sup> *Id.* at 803A(3).

<sup>90</sup> *Id.* at 803(4), 803A.

<sup>91</sup> *Id.* at 803(2), (4), 803A.

<sup>92</sup> Radke, *supra* note 9, at 405.

<sup>93</sup> See MICH. R. EVID. 803A(2).

<sup>94</sup> *Id.* at 803A.

<sup>95</sup> For a rationale of MICH. R. EVID. 803A, see ROBINSON ET AL., *supra* note 72; see also Radke, *supra* note 9, at 405.



requirement of MRE 803A in order for the court to admit the statements.<sup>96</sup> The court interpreted one particular requirement of MRE 803A—that “the statement is shown to have been *spontaneous* and *without indication of manufacture*.”<sup>97</sup>

Stacy Morgan, an adult family friend of both the child victim and her mother, gave the testimony at trial.<sup>98</sup> Morgan testified to corroborate statements the young child had made when she first disclosed the defendant’s sexual abuse to Morgan.<sup>99</sup> The child’s disclosure to Morgan of the defendant’s sexual abuse came only after Morgan asked the child victim “if anyone had been touching her.”<sup>100</sup> The victim responded that the defendant had touched her and then “willingly gave details that exceeded the scope of Morgan’s inquiry” and volunteered specific details regarding how, where, and when the defendant sexually abused her.<sup>101</sup>

After the Michigan Court of Appeals affirmed the defendant’s conviction, the defendant appealed, arguing that the statements made by the victim to Morgan were inadmissible because they were not spontaneous, as required by MRE 803A.<sup>102</sup> In reaching its decision that the statements were not spontaneous, the Michigan Supreme Court rejected a totality of the circumstances approach, and instead focused only on one factor to reject the spontaneity— that the adult had introduced the subject of sexual abuse.<sup>103</sup> The court held that, because Morgan had broached the subject of sexual abuse when she asked the child victim “if anyone had been touching her,”<sup>104</sup> the court

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<sup>96</sup> *Gursky II*, 786 N.W.2d 579, 582 (Mich. 2010).

<sup>97</sup> *Id.* at 590–91 (quoting MICH. R. EVID. 803A).

<sup>98</sup> *People v. Gursky (Gursky I)*, No. 274945, 2008 WL 2780282, at \*1–2 (Mich. Ct. App. July 17, 2008), *vacated, aff’d on other grounds*, 786 N.W.2d 579.

<sup>99</sup> *Id.* at \*2.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Gursky II*, 786 N.W.2d 579, 582 (Mich. 2010).

<sup>103</sup> *Id.* at 593 (rejecting the Court of Appeals’ approach, which focuses on a variety of indicia of reliability).

<sup>104</sup> *Gursky I*, 2008 WL 2780282, at \*2.

could not consider any of the subsequent statements made by the child as spontaneous.<sup>105</sup>

In support of its decision to constrain the meaning of spontaneous statements, the court referred to a New Jersey case, *State v. D.G.*<sup>106</sup> In *State v. D.G.*, the child made statements in a stressful situation where the child had been interrogated by her aunt, who had been screaming at the child.<sup>107</sup> In addition, the child had initially lied and made several inconsistent statements.<sup>108</sup> Reiterating the holding of the *D.G.* case, the *Gursky* court concluded that a child's statements made during an interrogation by an adult are not spontaneous.<sup>109</sup>

While the court correctly read the holding of the *D.G.* case,<sup>110</sup> the court incorrectly applied that holding to the facts in *Gursky*. The court failed to differentiate between two situations: when a child is interrogated and when an adult asks a child a question. In *Gursky*, none of the elements that were present in the *D.G.* case existed when the victim made the statement.<sup>111</sup> There was no indication of any screaming or interrogation by Morgan, and no evidence suggested that the child lied.<sup>112</sup> Further, the child volunteered specific and detailed information about the sexual abuse in her statements, evidencing the requisite spontaneous elements.<sup>113</sup>

In comparing the two cases and in using the *D.G.* case as

<sup>105</sup> *Gursky II*, 786 N.W.2d at 593.

<sup>106</sup> *Id.* at 590 (citing *State v. D.G.*, 732 A.2d 588, 592–95, (N.J. 1999)).

<sup>107</sup> *D.G.*, 732 A.2d at 595.

<sup>108</sup> *Id.*

<sup>109</sup> *Gursky II*, 786 N.W.2d at 590 (citing *D.G.*, 723 A.2d at 595).

<sup>110</sup> *D.G.*, 723 A.2d at 595. “The situation under which Michelle disclosed the sexual abuse was very stressful. Michelle did not spontaneously divulge information concerning the assault to Aunt Sandy, but rather Aunt Sandy interrogated her after finding her performing questionable acts while at play.” *Id.*

<sup>111</sup> Compare *D.G.*, 723 A.2d at 595, with *Gursky II*, 786 N.W.2d at 592, and *Gursky I*, No. 274945, 2008 WL 2780282, at \*2 (Mich. Ct. App. July 17, 2008), vacated, *aff'd on other grounds*, 786 N.W.2d 579.

<sup>112</sup> See *Gursky II*, 786 N.W.2d at 592; *Gursky I*, 2008 WL 2780282, at \*2.

<sup>113</sup> *Gursky II*, 786 N.W.2d at 592; *Gursky I*, 2008 WL 2780282, at \*2.

support for its holding, the court essentially grouped all cases where a child does not broach the subject of sexual abuse into one category of non-spontaneous statements, despite the fact that some statements possess more spontaneity than others. Clearly a statement made by a child under the stress and pressure of the circumstances presented in the *D.G.* case are less spontaneous and present a higher risk of manufacture than the statement made by Gursky's victim. Further, despite citing to the *D.G.* case, the court neglected to recognize that in looking to the various factors—i.e. that the child had lied, the adult had screamed, that the child had been interrogated—the New Jersey court was using a totality of the circumstances approach to reach its conclusion, and was not establishing a general rule regarding spontaneity.<sup>114</sup>

Although the *Gursky* court determined that the statements themselves were inadmissible, the court upheld the defendant's convictions of four counts of first-degree criminal sexual conduct.<sup>115</sup> The court affirmed the conviction based on the large quantity of evidence the prosecution presented at trial, which is not typical in a child sexual abuse case.<sup>116</sup> The child victim, three corroborating witnesses, and a nurse, all testified for the prosecution.<sup>117</sup> In fact, the prosecution did not substantially rely on the statements at issue in proving the defendant's guilt at trial.<sup>118</sup>

#### IV. THE ELIMINATION OF MRE 803A AND THE INCREASED DIFFICULTY FOR THE PROSECUTION

While the court's determination that the prosecution could not admit the hearsay testimony under MRE 803A did not affect the holding in the specific case, the narrowing effect of the

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<sup>114</sup> See *D.G.*, 723 A.2d at 595. For a discussion of New Jersey's hearsay exception, see *infra* Part V.

<sup>115</sup> *Gursky II*, 786 N.W.2d at 582.

<sup>116</sup> *Id.*; *Gursky I*, 2008 WL 2780282, at \*1; see *supra* Part I (discussing the rarity of physical evidence in child sexual abuse cases).

<sup>117</sup> *Gursky I*, 2008 WL 2780282, at \*1.

<sup>118</sup> *Gursky II*, 786 N.W.2d at 582.

court's decision on the application of the exception will negatively impact future prosecutions of child sexual abuse in the state of Michigan. The decision substantially restricts the statements that will constitute as "spontaneous" in such a way so as to basically eliminate the exception altogether.

According to the holding, for a child's statement to qualify as a "spontaneous statement" and thus be admissible under MRE 803A, the child must have broached the subject of sexual abuse.<sup>119</sup> In reaching its decision, the court implied that it was not eliminating the rule altogether. Rather, the court stated that while "the mere fact [that] questioning occurred is not incompatible with a ruling that the child produced a spontaneous statement . . . for such statements to be admissible, the child must broach the subject of sexual abuse . . ." <sup>120</sup> The court, in an attempt to limit its holding, continued, "we do *not* hold that any questioning by an adult automatically renders a statement 'nonspontaneous' and thus inadmissible under MRE 803A."<sup>121</sup> However, as this section explores, the court's qualification still renders the majority of statements made by children disclosing sexual abuse inadmissible.

While the ruling differentiates statements made in response to an adult broaching the subject of sexual abuse and statements made in response to any questioning by an adult,<sup>122</sup> the unique nature of child sexual abuse and its psychological implications<sup>123</sup> make the differentiation immaterial. The scientific studies clearly indicate that children rarely disclose sexual abuse and that when they do, it is not the child who broaches the subject of sexual abuse.<sup>124</sup> Thus, a rule that only admits a child's statements when the child broaches the subject of sexual abuse makes most statements inadmissible. The result is that the holding permits admissibility in the minority of cases—where children on their

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<sup>119</sup> *Id.* at 591.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> See *supra* Part I, for a discussion concerning the lack of disclosure in child sexual abuse cases.

<sup>124</sup> See *supra* Part I.

own accord disclose sexual abuse—but blocks admissibility in the majority of cases—where such disclosure is only made when the child feels comfortable with the adult and the adult asks more focused questions.<sup>125</sup>

This restrictive interpretation of MRE 803A limits the rule to a much narrower hearsay exception that is similar to the rule in Maryland.<sup>126</sup> Maryland currently only permits out-of-court statements made by a child victim to a physician, psychologist, nurse, social worker, or other school official (i.e. a principal, teacher, or counselor).<sup>127</sup> Maryland's statute is one of the most restrictive in regards to hearsay exceptions in child sexual abuse cases.<sup>128</sup> As a result of the restrictive statute, cases exist where the court acquits an alleged sexual abuser for trivial reasons, for example, that the child's statement was made to a police officer, rather than to an individual listed under the statute.<sup>129</sup> The Maryland statute is a *per se* rule, in that if the statement is not made to a qualified individual under the statute, the statement cannot even be reviewed by the judge for reliability.<sup>130</sup> The highly restrictive rule fails to appropriately balance the interests of the child against the interests of the accused.<sup>131</sup> Such a rule does not provide that judges and jurors analyze all of the evidence and determine the credibility of the statements.<sup>132</sup> Instead of balancing, the rule primarily protects the alleged abusers, and undermines the interests of the child victims.<sup>133</sup>

The consequences of the court's near elimination of MRE 803A, and its tendency towards a more restrictive approach similar to the Maryland rule, is that prosecutors will face an

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<sup>125</sup> See *supra* Part I.

<sup>126</sup> MD. CODE ANN., CRIM. PROC. § 11-304 (West 2011).

<sup>127</sup> § 11-304.

<sup>128</sup> McLain, *supra* note 10, at 21–22.

<sup>129</sup> *Id.* at 23 (citing Jackie Powder, *Judge's Ban of Social Worker's Testimony in Child Abuse Case Upsets Investigators*, BALT. SUN, Aug. 9, 1992, at 6B).

<sup>130</sup> McLain, *supra* note 10, at 23–24.

<sup>131</sup> See *id.* at 24.

<sup>132</sup> *Id.* at 24.

<sup>133</sup> See *id.*

even more difficult challenge in child sexual abuse cases, and child sex abusers could go free. Before *Gursky*, prosecutors already faced substantial challenges in combating child sexual abuse crimes because of the little, or inconclusive, medical or physical evidence available in most cases.<sup>134</sup> This lack of evidence is a large factor in the low rate of prosecution of sexual abuse crimes in comparison to the prosecution of other violent crimes.<sup>135</sup> Given the evidence that the actual incidence of child sexual abuse is much greater than the reported number, and given the low prosecution rate, it is clear that, even prior to *Gursky*, courts needed to facilitate the prosecution of child sexual abuse.<sup>136</sup>

Since children's statements usually represent the central evidence for the prosecution,<sup>137</sup> and in most cases prosecutors rely on a child's out-of-court statements to identify and prosecute the abuser,<sup>138</sup> the holding significantly disadvantages the prosecution. If the prosecution is unable to use these statements, it possesses even less evidence against the alleged sexual abuser.<sup>139</sup> By reducing the ability of the prosecution to introduce an adult's testimony that corroborates the child's testimony at trial, the *Gursky* court added another obstacle for the prosecution.<sup>140</sup>

In codifying a specific hearsay exception for child sexual abuse cases, it is evident that the Michigan legislature realized the importance of the admissibility of these statements at trial.<sup>141</sup>

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<sup>134</sup> London et al., *supra* note 18, at 194 (citing Jan Bays & David Chadwick, *Medical Diagnosis of the Sexually Abused Child*, 17 CHILD ABUSE & NEGLECT 91 (1993); Abbey Berenson et al., *Appearance of the Hymen in Newborns*, 87 PEDIATRICS 458 (1991)).

<sup>135</sup> Finkelhor, *supra* note 18, at 31.

<sup>136</sup> *See id.*

<sup>137</sup> London et al., *supra* note 18, at 194-95.

<sup>138</sup> *See* McLain, *supra* note 10, at 29.

<sup>139</sup> *Id.*

<sup>140</sup> *See supra* Part II for a discussion of the corroboration requirement of MRE 803A.

<sup>141</sup> *See supra* Part II for a discussion on the reasons the Michigan legislature codified MRE 803A and the rule's previous history as a common law exception to the hearsay rule known as the tender years exception.

A decision that undermines the legislative intent by restricting the use of the rule to a few very rare cases is unworkable. Rather, an approach that considers the unique nature of child sexual abuse cases and provides for the admissibility of a child's statements when they are in fact spontaneous, given the circumstances under which they were made, is a more responsible alternative that will not result in a detriment to the prosecution and a danger to society. While limitations on the admissibility of out-of-court statements serve important interests, including assuring that false accusations are not admitted as evidence against the accused, there are less restrictive means to protect such interests that strike an appropriate balance.

#### V. TOTALITY OF THE CIRCUMSTANCES: A MORE APPROPRIATE TEST FOR SPONTANEITY

An ideal test for the admissibility of statements made by a child to an adult regarding sexual abuse needs to be cognizant of two societal interests—protecting the accused and protecting the victim. Courts must address two fears at different ends of the spectrum: the fear of a false accusation, and the fear that absent adult questioning, a child who has been sexually abused will never disclose the abuse.<sup>142</sup> When the *Gursky* court decided that statements made by a child who does not broach the subject of sexual abuse are *generally* inadmissible,<sup>143</sup> the court addressed the former concern, but failed to even remotely address the latter. These interests are instead more adequately protected by applying the totality of the circumstances test used by the Michigan Court of Appeals,<sup>144</sup> and by various other states,<sup>145</sup> to analyze the child's statements and the questioning by the adult to determine the admissibility of the hearsay statements.

The Michigan Court of Appeals applied the totality of the

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<sup>142</sup> See *supra* Part I.

<sup>143</sup> *Gursky II*, 786 N.W.2d 579, 591 (Mich. 2010).

<sup>144</sup> *Gursky I*, No. 274945, 2008 WL 2780282, at \*2 (Mich. Ct. App. July 17, 2008), *vacated, aff'd on other grounds*, 786 N.W.2d 579.

<sup>145</sup> Delaware, Mississippi, and New Jersey are a few states that apply a similar test. For a discussion of those tests, see *infra* pp. 123–25.

circumstances test in *Gursky* to determine the admissibility of the out-of-court statements.<sup>146</sup> The court considered the following elements: the victim's and the adult's behavior during the questioning, what information the victim volunteered on her own accord, and whether the victim was prompted by the adult's questioning.<sup>147</sup> One important factor the court considered was that the victim had volunteered specific details and information.<sup>148</sup> Based on the facts, the court held that "[t]aken as a whole, the victim's statements were primarily spontaneous" and thus admissible.<sup>149</sup> Instead of looking to one particular question to reject spontaneity—that the adult had broached the subject of sexual abuse<sup>150</sup>—as the Michigan Supreme Court did, the court looked to all the circumstances to determine whether the statements as a whole were spontaneous.<sup>151</sup> The appellate court was not alone in applying this approach: New Jersey, Mississippi, and Delaware also use similar rules.

New Jersey uses New Jersey Rule of Evidence 803(c)(27), which is similar to MRE 803A.<sup>152</sup> The New Jersey rule is more lenient than MRE 803A, in that the rule permits the courts to analyze the totality of the circumstances<sup>153</sup> in determining the trustworthiness of the statement.<sup>154</sup> New Jersey, like other states,

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<sup>146</sup> *Gursky I*, 2008 WL 2780282, at \*2.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Gursky II*, 786 N.W.2d 579, 582 (Mich. 2010).

<sup>151</sup> *Gursky I*, 2008 WL 2780282, at \*2.

<sup>152</sup> N.J. R. EVID. 803(c)(27).

<sup>153</sup> The New Jersey court reaffirmed this approach in *State v. P.S.*, 997 A.2d 163 (N.J. 2010). "We reiterate that the totality of circumstances standard is the appropriate benchmark for the admissibility of a tender-years statement under N.J.R.E. 803(c)(27)." *Id.* at 182.

<sup>154</sup> See N.J. R. EVID. 803(c)(27).

Statements by a child relating to a sexual offense. A statement by a child under the age of 12 relating to sexual misconduct committed with or against that child is admissible in a criminal, juvenile, or civil proceeding if (a) the proponent of the statement makes known to the adverse party his intention to offer the statement and the particulars of the statement at such time as to provide him with a fair



adopted the tender years exception to serve legitimate and significant law enforcement interests.<sup>155</sup> For courts to admit out-of-court statements in New Jersey, the statements must “possess ‘sufficient indicia of reliability.’”<sup>156</sup> In determining what factors the court should analyze to decide whether the statements were trustworthy and thus admissible, New Jersey looked to the Supreme Court’s decision in *Idaho v. Wright*. There, the Court declined to implement a mechanical test and instead considered factors like “spontaneity, consistency of repetition, lack of motive to fabricate, the mental state of the declarant, use of terminology unexpected of a child of similar age, interrogation, and manipulation by adults.”<sup>157</sup> In applying those factors in *State v. D.G.*, the New Jersey court held that New Jersey Rule of Evidence 803(c)(27) “requires the court to find . . . that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy.”<sup>158</sup>

New Jersey and Michigan are not the only states to acknowledge the importance of the admissibility of such statements by adopting exceptions to the hearsay rule in child sexual abuse cases. Mississippi<sup>159</sup> and Delaware<sup>160</sup> have similar rules. Mississippi’s hearsay exception requires the court to find

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opportunity to prepare to meet it; (b) the court finds, in a hearing conducted pursuant to Rule 104(a), that on the basis of the time, content and circumstances of the statement there is a probability that the statement is trustworthy; and (c) either (i) the child testifies at the proceeding, or (ii) the child is unavailable as a witness and there is offered admissible evidence corroborating the act of sexual abuse; provided that no child whose statement is to be offered in evidence pursuant to this rule shall be disqualified to be a witness in such proceeding by virtue of the requirements of Rule 601.

*Id.*

<sup>155</sup> See *State v. D.G.*, 723 A.2d 588, 593 (N.J. 1999) (quoting *State v. D.R.*, 537 A.2d 667, 675 (N.J. 1988)).

<sup>156</sup> *Id.* at 593 (quoting *D.R.*, 537 A.2d at 675).

<sup>157</sup> *Id.* at 594 (quoting *Idaho v. Wright*, 497 U.S. 805, 821–22, 827 (1990)).

<sup>158</sup> *Id.* at 596.

<sup>159</sup> MISS. R. EVID. 803(25).

<sup>160</sup> DEL. CODE ANN. tit. 11, § 3513 (West 2011).

“in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide substantial indicia of reliability.”<sup>161</sup> Mississippi courts have similarly cited factors from the Supreme Court’s decision in *Idaho v. Wright* to determine the reliability of the child’s statements.<sup>162</sup> In Mississippi, the court need not make specific findings on each factor, but rather can consider all relevant factors to determine whether enough evidence of reliability and spontaneity exist for the court to deem the hearsay statement admissible.<sup>163</sup>

Similarly, the Delaware rule requires a determination that the “statement is shown to possess particularized guarantees of trustworthiness.”<sup>164</sup> In reaching a decision, some of the factors the court should consider include, “[t]he child’s personal knowledge of the event,” “[t]he age and maturity of the child,” “[c]ertainty that the statement was made, including the credibility of the person testifying about the statement,” “whether the statement is suggestive due to improperly leading question,” and “whether the statement is spontaneous or directly responsive to questions . . . .”<sup>165</sup> In applying the rule, the Delaware Supreme Court affirmed the admission of a child’s out-of-court statements where the “[t]rial judge found there was no known motive for her to falsify her statement, her terminology was age appropriate, the statement was videotaped, the questions were not improperly leading, and defendant had the opportunity to commit the alleged act.”<sup>166</sup>

Like the Michigan Court of Appeals in *Gursky*, the approaches in Delaware, Mississippi, and New Jersey focus on an analysis of the entire statement to determine its reliability,

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<sup>161</sup> MISS. R. EVID. 803(25)(a).

<sup>162</sup> *Bridgeman v. State*, 2009-KA-01389-COA (¶ 22), 58 So. 3d 1208, 1213–14 (Miss. Ct. App. 2010) (citing *Idaho v. Wright*, 497 U.S. 805, 822 (1990)).

<sup>163</sup> *Id.* ¶ 23, 58 So. 3d at 1214.

<sup>164</sup> DEL. CODE ANN. tit. 11, § 3513(b)(2)(b) (West 2011).

<sup>165</sup> *Id.* § 3513(e)(1)–(3), (11), (12).

<sup>166</sup> *Randall v. State*, No. 44, 2006 WL 2434912, at \*1 (Del. Aug. 21, 2006).

and thus its admissibility. These states consider the environment in which the statement was made, and how it was made.<sup>167</sup> More importantly, the states' rules do not require that the child broach the subject of sexual abuse.<sup>168</sup> By looking to all the circumstances in which a child made a statement to determine spontaneity and reliability, the admissibility tests in these states more adequately balance the interests of protecting the child and the accused.

The *Gursky* court failed in balancing both of these interests and seemed more concerned with the rights of the accused than with the consequences of such a restrictive rule on the prosecution of child sexual abuse cases.<sup>169</sup> This failure by the court is particularly worrisome given the evidence indicating the rarity of false accusations<sup>170</sup> and that there is little if any indication of a prevalence of unwarranted convictions.<sup>171</sup> A study in 1987 found that 8% of the allegations in a sample of child sexual abuse allegations were false, with 6% originating from adults and 2% originating from children.<sup>172</sup> Another study in 1989 found the percentage of false allegations in samples to be between 4.7% and 7.6%.<sup>173</sup> These studies suggest that the rate of false allegations is under 8%, and that the rate of false allegations arising from children is even lower.<sup>174</sup>

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<sup>167</sup> *Gursky II*, 786 N.W.2d 579, 590–91 (Mich. 2010); *Randall*, 2006 WL 2434912, at \*1; *State v. D.G.*, 723 A.2d 588, 593 (N.J. 1999); *Bridgeman*, ¶¶ 22–24, 58 So. 3d at 1213–14.

<sup>168</sup> DEL. CODE ANN. tit. 11, § 3513(e); MISS. R. EVID. 803(25); N.J. R. EVID. 803(c)(27).

<sup>169</sup> See *supra* Part IV.

<sup>170</sup> John C. Yuille et al., *The Nature of Allegations of Child Sexual Abuse*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT, *supra* note 13, at 21, 23.

<sup>171</sup> McLain, *supra* note 10, at 68–71 (citing Finkelhor, *supra* note 18, at 43, 45).

<sup>172</sup> Yuille et al., *supra* note 170, at 23 (citing David P.H. Jones & J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J. INTERPERSONAL VIOLENCE 27, 27–45 (1987)).

<sup>173</sup> *Id.* (citing Mark D. Everson & Barbara W. Boat, *False Allegations of Sexual Abuse By Children and Adolescents*, 28 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 230, 230–35 (1989)).

<sup>174</sup> *Id.* at 23–24.

The fear of false accusations is further undermined by the MRE 803A protections for the accused. Most significantly, MRE 803A(2) requires the statement be “spontaneous *and* without indication of manufacture,” which is an entirely separate factor the court can consider for admissibility.<sup>175</sup> Further, MRE 803A only allows a hearsay statement to be introduced as evidence “to the extent that it corroborates testimony given by the declarant during the same proceeding.”<sup>176</sup> Thus, the rule recognizes the accused’s constitutional right of due process in requiring that the accused may confront all witnesses testifying against him or her.<sup>177</sup> The exception is even further limited in that it only permits testimony regarding the first corroborative statement made by the child, despite the fact that there may have been multiple statements.<sup>178</sup>

Notwithstanding the rarity of false accusations and the fact that MRE 803A provides protections for the accused, the totality of the circumstances test still adequately protects against any false accusations. The test requires an analysis of all of the circumstances surrounding the statement to determine the trustworthiness of the statement.<sup>179</sup> An application of the test identifies spontaneity based on the circumstances in which the

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<sup>175</sup> MICH. R. EVID. 803A(2) (emphasis added).

<sup>176</sup> MICH. R. EVID. 803A.

<sup>177</sup> Radke, *supra* note 9, at 405. The rule balances the rights of the accused and the potential that testifying will cause harm to the child. See Lorne D. Bertrand et al., *The Child Witness in Sexual Abuse Cases: Professional and Ethical Considerations*, in TRUE AND FALSE ALLEGATIONS OF CHILD SEXUAL ABUSE: ASSESSMENT AND CASE MANAGEMENT, *supra* note 13, at 319, 320–21 (discussing evidence that testifying might cause emotional and psychological harm to children). The child may be “revictimized” by the experience when he or she is required to provide details relating to the abuse and relive the experience. *Id.* at 320. Testifying in court is a traumatic experience for children who have already dealt with the pain of the actual sexual abuse itself, but the right of the accused to face his or her accuser is an important one. *Id.* at 320–21.

<sup>178</sup> MICH. R. EVID. 803A.

<sup>179</sup> See *Gursky I*, No. 274945, 2008 WL 2780282, at \*2 (Mich. Ct. App. July 17, 2008), *vacated, aff’d on other grounds*, 786 N.W.2d 579; see also *supra* pp. 122–25.

questioning occurred, what questions were asked, and what the child's responses were to the questions. In this analysis, an accused will be adequately protected against false accusations because the circumstances surrounding the statements and the statements themselves would reveal fabrication or inconsistent testimony. The circumstances and any inconsistencies would then be considered in the determination of the admissibility of the statements under MRE 803A.

Aside from protecting the accused, the totality of the circumstances test more adequately protects the child victims than the restrictive rule announced in *Gursky*. If most children will not disclose the existence of sexual abuse,<sup>180</sup> it is necessary for any test determining spontaneity to permit an adult to broach the subject of sexual abuse in order to create a workable exception. A totality of the circumstances test is more appropriate because it allows for an adult to broach the subject of sexual abuse so long as the child's statements are still spontaneous.

Research by some psychologists suggests that they would support a totality of the circumstances test. Several psychologists have argued that to evaluate the truth of an allegation of child sexual abuse, objectivity is critical and many factors should be taken into account.<sup>181</sup> Tara Ney, a registered psychologist in Canada who focuses on treating children and adults who have suffered from trauma, suggests that to assess the veracity of an allegation, the following should be considered and analyzed: the parties involved, the specifics concerning the circumstances and the context in which the child made the accusations, including what the child said, and specifically, what circumstances existed when the child made the initial statement.<sup>182</sup> These findings support the totality of the circumstances approach because they favor a broad assessment of the conditions in which the statement was made.

Additionally, studies indicate that there may actually be

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<sup>180</sup> See *supra* Part I.

<sup>181</sup> Ney, *supra* note 13, at 11–12.

<sup>182</sup> *Id.*

benefits of directed questioning, as opposed to waiting for a child's free recall.<sup>183</sup> Benefits of this type of questioning include that children may give longer responses and include more important details.<sup>184</sup> Because directed and focused questioning is much more effective in obtaining disclosure of sexual abuse than waiting for a child to recall the incident, the court should not discourage such questioning.<sup>185</sup> Still, statements made in response to directed and focused questioning should only be admissible if, after analyzing the totality of the circumstances, the statements on a whole were spontaneous.

Michigan has already applied a totality of the circumstances test for the admissibility of statements using other similar hearsay exceptions. For example, in a case concerning the admissibility of a child's statements made to a physician, the court held that to determine the trustworthiness of the child's statement, relevant factors included: the child's age and maturity, how the statements were elicited, how the statements were phrased, the use of unexpected terminology given the child's age, who initiated the questioning, the relationship of the child to the adult, and whether or not there was a motive to fabricate.<sup>186</sup> Courts should extend this test to the application of MRE 803A in order to avoid a complete elimination of the hearsay exception.

## CONCLUSION

Statutory history reveals that the Michigan legislature introduced a specific hearsay exception solely for child sexual abuse cases, because it felt strongly that the courts needed such an exception.<sup>187</sup> MRE 803A permits an adult, after a sexually

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<sup>183</sup> Ceci & Friedman, *supra* note 66, at 45–46 (citing ALFRED BINET, *LA SUGGESTIBILITÉ* 255–56, 294 (1900)).

<sup>184</sup> *Id.* at 45.

<sup>185</sup> *Id.* at 46.

<sup>186</sup> *People v. Correa*, No. 290271, 2010 WL 1979297, at \*3 (Mich. Ct. App. May 18, 2010) (citing *People v. Meeboer*, 484 N.W.2d 621, 627 (Mich. 1992)).

<sup>187</sup> ROBINSON ET AL., *supra* note 72; *see supra* Part II (examining how

abused child confides in him or her, to corroborate these statements in court in order to confirm what the child initially said.<sup>188</sup> Any alteration in the criminal process that makes it more difficult for prosecutors to use the exception contradicts the very reasoning behind its adoption.

While courts must still weed out false accusations to prevent a wrongful conviction, it is crucial not to let this interest obscure the need to protect children from sexual abuse. In addition to protecting the rights of the accused, the court must vigilantly protect evidentiary rules encouraging disclosure, recognizing the various reasons why children are too fearful to disclose,<sup>189</sup> and assisting the prosecution of those who are the cause of such fear.

To facilitate prosecution, courts cannot so rigidly define spontaneity. Instead, a totality of the circumstances approach is more appropriate to the determination of whether a statement is spontaneous within the meaning of MRE 803A. Such an approach maintains the efficacy of the exception, ensures that admitted statements are spontaneous given the context in which they were made, and does not serve as an additional impediment to the prosecution.

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the difficulty in prosecuting child sexual abuse cases led to the legislature's adoption of a specific hearsay exception for these cases).

<sup>188</sup> MICH. R. EVID. 803A(4); ROBINSON ET AL., *supra* note 72.

<sup>189</sup> See *supra* Part I (exploring the various reasons why children are often too fearful to disclose sexual abuse and the need for a specific hearsay exception for corroboration of child sexual abuse).